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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

NOS. 15 AND 16

A. S. ALEXANDER, H. D. RUMMEL and GEORGE S. BATON, as Receivers of Tower Hill Connellsville Coke Company of West Virginia, a Corporation, Petitioners,

v.

J. H. HILLMAN, JR., A. B. SHEETS, THOMAS WATSON, HILLMAN COAL AND COKE COMPANY, a Corporation, and HECLA COAL AND COKE COMPANY, a Corporation, Respondents.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENTS.

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On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENTS.

I.

QUESTIONS INVOLVED.

(1) Where a Federal District Court has appointed Receivers to wind up the affairs of a solvent corporation and appointed a Master under an Order of Reference to receive Proofs of Claims of creditors and stockholders of such Corporation, and non-resident claimants, not parties to the proceedings, pursuant to said Order of Reference and notice given by the Master, appear before the Master and present their Proofs of

Claim, does such action make them parties to the Primary Cause and subject them to the jurisdiction of the Court on a Bill of Complaint thereafter brought by the Receivers against them in said Court setting up certain claims against them not merely as defenses to the claims filed, but on which affirmative relief is sought by way of personal decrees for money damages?

(2) Is the presentation of a Proof of Claim upon a reference in a Federal Equity Receivership under penalty of forfeiture of claimant's right to participate in the distribution of the Estate in Receivership equivalent to filing a Bill in Equity against the Corporation in Receivership?

(3) May separate unrelated claims filed with a Special Master under an Order of Reference in a receivership proceeding be treated as a single Bill in Equity conforming to the Equity Rules, and may a Bill of Complaint, joining as defendants the several claimants, purporting to be filed as ancillary to the original cause in which the Order of Reference was entered, and which sets up new, independent and separate causes of action against said claimants, be treated as an Answer and Counter-claim to each of said Proofs of Claim under Equity Rule 30?

II.

COUNTER-STATEMENT OF CASE.

As Petitioners have filed but one brief at Nos. 15 and 16 October Term, 1935 of this Court, in which the reference to the records are to the printed record at No. 15, the Respondents, for the convenience of the Court, have adopted the same procedure. Respondents also accept Petitioners' Statement of the Case, as set forth in Petitioners' Brief, as being in the main correct, except for the corrections and amplifications thereof hereinafter set forth.

Petitioners, in adopting this procedure, however, call attention to the fact that while each appeal in the Circuit Court of Appeals of the Fourth Circuit from the decree of the District Court for the Southern District of West Virginia involved the same question and the parties thereto were the same, the said appeals were taken from decrees of the District Court entered in two causes in which the parties and issues involved were entirely different. None of the Respondents was a party to the "Primary Cause" or had intervened therein.

On March 30, 1930, proceedings ancillary to the said cause had already been commenced and Petitioners had been appointed Ancillary Receivers of Tower Hill in the United States District Court for the Western District of Pennsylvania, which proceedings are now pending, 64 Fed. 2nd. 818, (R. 3). In said district all of the property and assets of Tower Hill are situate and all of the Respondents are inhabitants thereof (R. 67).

The so-called "Ancillary Bill of Complaint", (R. 39) for a statement of the grounds upon which the Court's jurisdiction depends, alleges the appointment of Petitioners as Receivers for Tower Hill in the Primary Cause, the order of Reference to the Special Master, the

hearing held thereon, the appearance by Respondents thereat and the presentation of their Proofs of Claims in said proceeding. The Bill thereupon sets forth certain alleged causes of action against the Respondents severally and prays for affirmative relief in the form of decrees for the payment of money against one or more of them upon each of said causes.

The Bill alleges that Respondents Hillman, Sheets and Watson continuously during the respective periods in said Bill set forth were officers and directors of Tower Hill, Tower Hill of Pennsylvania and Eastern and were also officers and directors of the Hillman Company, Hecla, Thompson-Connellsville Coke Company, and Fayette Investment Company (R. 46), and that the majority of the directors and officers of each of said corporations were the same persons, were nominees and for all practical purposes the employees of Hillman, that Hillman was the dominating influence of all of said corporations and that Sheets and Watson as officers and directors thereof acquiesced in and approved of such domination and lent their assistance in carrying it into effect. (R. 42, 46).

The Bill further alleges that "the majority of the directors of Hecla and Tower Hill of Pennsylvania were the same persons, and Hecla, through its control of Fayette Investment Company and thereby of Thompson-Connellsville Coke Company, was the owner of the majority of the capital stock of Tower Hill, which in turn owned all the stock of Tower Hill of Pennsylvania". (R. 52).

The gist of the alleged wrongful acts of the several Respondents complained of and the relief sought against them and each of them are:

One. The taking of certain sums monthly by Respondents, Hillman, Sheets and Watson, during the

period from May 1920 to October, 1933 under the guise of salaries as officers of Tower Hill, Tower Hill of Pennsylvania and Eastern (R. 42, 43). The relief sought is a decree for an accounting and payment of these moneys by said Respondents and each of them (R. 54).

Two. The purchase of 11,840 shares of capital stock of Emerald Coal and Coke Company, for which the sum of $1,184,000.00 was paid by Tower Hill, on the ground that the expenditure of said funds was a misappropriation of the moneys of Tower Hill, made for the benefit of Hillman and constitutes mismanagement of the corporate affairs of Tower Hill of a fraudulent character (R. 43-46). The relief sought is a decree against Respondents, Hillman, Sheets and Watson, and each of them, for the payment of $1,184,000.00, with interest, on the surrender by the Petitioners of the said shares of stock (R. 54).

Three. Improvident and fraudulent waste and misappropriation of the funds of Tower Hill, Tower Hill of Pennsylvania and Eastern by means of a pool arrangement by which the Respondent, Hillman Company, apportioned and allocated certain office, overhead and engineering expense among various corporations, with which it was connected or affiliated, including the said three named companies, and the operation of Tower Hill and its said subsidiaries and sale of their products as mere departments of Hillman Company, in consequence of which Tower Hill and its said subsidiaries lost large sums of money (R. 46-51). The relief sought is that Respondents, Hillman, Sheets, Watson and Hillman Company account for all moneys received and retained by Hillman Company from Tower Hill and its said subsidiaries by reason of the said pool arrangement, and that said Respondents and each of them be decreed to pay to Petitioners, all such moneys as upon

said accounting may be adjudicated to be due and owing to Tower Hill or Petitioners (R. 55).

Four. The exchange by Tower Hill of Pennsylvania of 178.4 acres of coal with Redstone Coal and Coke Company for property known as Thompson-Connellsville No. 1 Plant of Redstone, alleged to have had little if any value, which exchange is alleged to have been caused by Hillman through his control of Tower Hill of Pennsylvania, for the purpose of benefiting Hillman and Hecla; and grossly improvident expenditures in taxes, maintenance and improvements of Thompson-Connellsville No. 1 Plant brought about by the fraud of Hillman, Sheets and Watson in imposing said property on Tower Hill of Pennsylvania (R. 51-54).

The relief sought is that Respondents, Hillman, Sheets, Watson and Hecla, and each of them, be decreed (a) to pay to Petitioners, the sum of $350,800.00, with interest, the alleged value in cash of the 178.4 acres traded by Tower Hill of Pennsylvania with Redstone in exchange for the said Thompson-Connellsville No. 1 property, upon conveyance by Petitioners of said property to such person or persons as the Court may direct; and (b) to account for and repay to Petitioners all moneys of Tower Hill and/or Tower Hill of Pennsylvania expended for taxes upon the operation and maintenance of said property, less such moneys as have been heretofore received by Tower Hill and/or Tower Hill of Pennsylvania for coal produced and coke manufactured and sold from said Thompson-Connellsville No. 1 property (R. 55).

The Circuit Court of Appeals, in the opinion of Northcott, J. (R. 67) says:

> "Most of the causes of action asserted in the ancillary bill appear not to have grown out of the transactions which were the basis of the claims

filed with the receivers, but to constitute independent claims in behalf of the receivers against claimants."

While each Proof of Claim presented to the Special Master by the several Respondents is a claim *ex contractu*, each cause of the action set up in the so-called Anciliary Bill is an action *ex delicto*. The sole relief asked against each Respondent is a decree *in personam* for the payment of money. While the several prayers are for accountings, the accountings sought are only for the purpose of ascertaining the damages alleged to have been sustained by reason of the alleged unlawful acts of the Respondents. The Bill contains no prayers for discovery, or for the recovery of any specific property, or for any other relief peculiar to equity.

Petitioners' statement, "Each of the matters complained of in the Ancillary Bill is cognizable in a court in equity," (Petitioners' Brief 5), is a question of law which they raise in their Argument (Petitioners' Brief 47).

The Order of Court entered February 19, 1934, in the Primary Cause, in addition to the matters stated by Petitioners (Petitioners' Brief 5), provided that all questions as to the jurisdiction of the Court and other questions were reserved by the Court for future decision as such questions might arise, and that nothing in said Order was decided, except that the said Bill should be filed and notice thereof be had as directed in said Order (R. 19). Respondents, in the Motions filed by them to vacate said Order in the Primary Cause and to dismiss the Bill of Complaint in the Ancillary Cause (Petitioners' Brief 5), each appeared specially for the purpose of making the said Motions and without submitting himself or itself to the jurisdiction of the Court, but

solely for the purpose of questioning said jurisdiction. The reasons assigned in each of said Motions were the same, viz., that each of the individual Respondents was at the time of the entry of the said Order and of the filing of the said Bill and always since has been a citizen, resident and inhabitant of the Commonwealth of Pennsylvania and a resident of the City of Pittsburgh, Allegheny County, in said Commonwealth, and each of the corporate Respondents is a corporation created and existing under the Laws of the Commonwealth of Pennsylvania, with its domicile in the City of Pittsburgh, in said Commonwealth and a citizen, resident and inhabitant of the said Commonwealth within the purview of Section 51 of the Judicial Code of the United States (U. S. Tit. 28, Sec. 112), with respect to venue (R. 21, 58).

The District Court in a Memorandum Decision held that it had no jurisdiction over Respondents to grant the affirmative relief prayed for in said Bill, and entered its Decree sustaining Respondents' Motions, and vacated its Order in the Primary Cause directing the Bill to be filed, and also entered a Decree in the Ancillary Cause dismissing the said Ancillary Bill. Upon appeal the Circuit Court of Appeals (75 Fed. (2) 451), held that the District Court was correct in holding that it had not acquired jurisdiction to grant any affirmative relief against Respondents, but did have jurisdiction to pass upon any defense, legal or equitable, which might be asserted against the claims filed with the Petitioners, and to stay action upon those claims until the claims asserted in the Ancillary Bill could be adjudicated in a court of competent jurisdiction, so that they could be set off against the claims, or the amounts payable thereunder, saying (R. 73):

"We think, therefore, that, instead of dismiss-

ing the ancillary bill, the court below should have retained it, treating it as a petition to stay action on the claims until counter-claims therein asserted could be adjudicated in a court of competent jurisdiction, and as setting up defenses to the claims in the cases where the matters alleged could be considered as purely matters of defense as distinguished from counter-claims. The order appealed from will accordingly be modified and the cause will be remanded to the end that the court below may give consideration to the question of staying action on the claims pending the adjudication of the counter-claims in a court of competent jurisdiction, and that it may consider any matter set up in the bill which may appropriately be considered as matter of defense against the claims filed. The court should require, however, that new pleadings be filed in lieu of the ancillary bill, setting up as against each claim filed with the receivers any purely defensive matter which the receivers may desire to assert, together with any matter which would justify the court in staying action on the claims pending the adjudication of any counter-claim or counter-claims in a court of competent jurisdiction. Modified."

III.

SUMMARY OF ARGUMENT.

(1) Issue One of Venue.

The fundamental issue in this case is not one of the general powers and jurisdiction of a federal court in a receivership in equity. The issue is one of venue in a civil suit brought by the receivers of such a court. The aim is to secure personal decrees, for the payment of money, against non-resident defendants, who appear here specially to raise the question of jurisdiction, asserting their right under Section 51 of the Judicial Code (U. S. C. A. Tit. 28, Sec. 112) to be sued in the district whereof they are inhabitants.

(2) So-Called Ancillary Bill Is an Original Bill Against Respondents.

Petitioners call the suit an ancillary one, but the issues and parties are not the same as the issues and parties in the primary cause.. Respondents, named as defendants in the so-called ancillary bill, were not parties to the primary cause, and the claims asserted against them here constitute new and independent claims against them. A contested claim is not a part of the receivership *res* but the subject of a plenary action, which the court has no inherent power to adjudicate without first obtaining jurisdiction over the person. Hence the bill of complaint here is an original bill as against the respondents, requiring original process.

(3) Proving of Claims in a Federal Equity Receivership Does Not Make the Claimant a Party to the Original Cause.

Under the federal practice a person does not, by filing a claim with the receiver, make himself a party to the original cause, much less to another so-called ancillary cause growing out of the original cause. The proceeding in which claimant appears and presents his claim is one in aid of the main suit. It is one in which the claim is presented on the invitation and for the information of the court and for said purpose claimant makes himself a party *pro hac vice* only.

(4) Respondents Have Not Waived the Privilege Under Section 51 of the Judicial Code by Presenting Claims in the Receivership Proceeding.

(a) NATURE OF PRIVILEGE.

The privilege of a non-resident defendant under Section 51 of the Judicial Code may be waived, but only by some act which *unequivocally* evidences his intent to submit himself to the jurisdiction of the court wherein suit has been brought, and his consent to its adjudication of the merits of the *particular* controversy wherein he is made a defendant. Respondents' presentation of their proofs of claim before the Special Master does not constitute such consent.

(b) RESPONDENTS HAVE NOT WAIVED THEIR PRIVILEGE.

There is a radical difference between presenting a proof of claim in a federal equity receivership and filing a bill in equity. The claimant is not in a court of his own choosing. He is not in any proper sense an actor or movant in the cause. His position is analogous to that of a defendant rather than a plaintiff. His claim

is presented on the invitation of the court, under penalty of its forfeiture if he fails to comply with the court's order, and for the information and guidance of the court, in making distribution of the estate of which it has taken custody. The claim is presented pursuant to a privilege exercised by the court, not the claimant. The court, as a result of the compliance with its order, casts around a claimant its protection from being subjected to litigation in said court in a suit seeking affirmative relief against him in the form of a money judgment or decree.

(c) DISCUSSION OF PETITIONERS' AUTHORITIES.

(5) Equity Rule 30 Has No Bearing on Question Involved.

The application of Equity Rule 30 contended for by petitioners would defeat the provisions of Section 51 of the Judicial Code. Furthermore, the rule was not intended to apply to proceedings of the kind before the Court and its application here would tend to confusion rather than simplification and serve no useful purpose.

(6) Comments on Contention That All Claims Asserted in So-Called Ancillary Bill Are Cognizable in Equity.

While the decision of the question whether any or all of the causes of action set up in the bill constitute causes of action at law is not necessary to a decision of the fundamental question of venue, there is an additional reason why they may not be asserted in a receivership suit, viz., that a counter-claim involving a cause of action at law cannot be asserted in a suit in equity. This because of the right of the party, against whom the claim is asserted, to a jury trial under the Seventh Amendment to the Constitution.

IV.

ARGUMENT.

(1) The Issue Involved in These Appeals in the Last Analysis Resolves Itself Into One of Venue.

The federal district wherein a civil suit shall be brought is fixed by Section 51 of the Judicial Code (U. S. C. A., Title 28, Sec. 112), which section, so far as it is applicable to this case, provides:

> "(a) Except as provided * * * in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; * * *."

The exceptions to the prohibition upon bringing any person before a district court by any original process or proceeding in any other district than that whereof he is an inhabitant, contained in Section 51 of the Judicial Code, do not apply to the proceedings before the Court.

None of the Respondents, parties to the so-called Ancillary Bill, which the District Court in its Order entered February 19, 1934, directed to be filed, was named as a party in the Bill of Complaint filed by Piedmont Coal Company, et al. against Tower Hill Connellsville Coke Company of West Virginia, or intervened therein. None of the Respondents is an inhabitant of the Southern District of West Virginia, but each of said parties is an inhabitant of the Western District of Pennsylvania.

Petitioners' first proposition as set forth in their Argument (Petitioners' Brief 11), is that "A district

court administering a receivership estate has authority to adjudicate all claims respecting the *res*, not only those to or against the *res* but those on behalf of the *res* against others," in support of which they cite the well known cases of *White v. Ewing*, 159 U. S. 36; *40 L. Ed.* 67; *Peck v. Elliott*, 79 Fed. 10 (C. C. A., 6th) and *Pope v. L. N. A. & C. Ry. Co.*, 173 U. S. 573, 43 L. Ed. 814.

They admit, however, that the jurisdiction of the court in administering an estate in receivership and adjudicating claims of or against the corporation in receivership is limited in that it must acquire jurisdiction of the persons against whom the power is sought to be exercised (Petitioners' Brief, 12).

Respondents do not question the jurisdiction of a federal district court to maintain an action by its receiver to recover moneys claimed to be due an estate in receivership from defendants who are residents of the district. Their sole objection is that the instant suit against them, they being non-residents of the district, must be brought in the district whereof they are inhabitants.

The fundamental question in the cases at bar, therefore, is not one of the general powers and jurisdiction of a court of equity in a receivership proceeding, but as was expressly stated in *Barfield v. Zenith Tire & Rubber Co.*, 9 Fed. (2nd) 204, the question is "simply one of venue of an action at law, the subject matter of which is within the court's jurisdiction * * *. It *(White v. Ewing, supra)*, does not reach the point in the motions raised before us." Whether the action be one at law or in equity, the principle is the same.

In *White v. Ewing, supra*, the non-resident defendants, decrees against whom were sustained, had volun-

tarily appeared and answered the ancillary bill. This fact appears in the Statement of the Case by Mr. Justice Brown (p. 37), also in the *per curiam* opinion of the Circuit Court of Appeals of the 6th Circuit, 66 Fed. 6; and is further commented upon in the footnote to *Kelly v. Gill,* 245 U. S. 116, 62 L. Ed. 185, at p. 188. We have been unable to find a case in which the jurisdiction of an ancillary bill of the nature of that in the cases at bar has been sustained against non-residents who had not similarly appeared and answered.

Peck v. Elliott, 79 Fed. 10 (C. C. A. 6th), is a case similar to *White v. Ewing, supra,* and differs from the cases at bar in that the defendant did not avail himself of the privilege of questioning the court's jurisdiction on the ground of venue. On the other hand, he filed a general answer, in which while objecting to the jurisdiction of the court on grounds other than venue, he at the same time pleaded to the merits.

Pope v. L. N. & A. C. Rwy. Co., 173 U. S. 573, 43 L. Ed. 814, has no analogy to the one at bar. The case was heard on the merits before the question of jurisdiction was raised (Opinion p. 575) and the question of the jurisdiction which was raised was not under Section 51 of the Judicial Code but as to the jurisdiction of the Receiver himself to bring the Bill under his order of appointment. The Bill brought by the Receiver was dismissed by the Circuit Court of Appeals and the Supreme Court in its opinion dismissed the Receiver's appeal.

As is said in *Schmitt v. Lamb,* 43 Fed. (2nd) 770, at 772:

> "In considering the exact question for determination, on the motion to quash the process, in the case at bar, it is necessary to distinguish between the court's having jurisdiction of the sub-

> ject-matter and bringing in new parties. In the latter case service of process in ancillary proceedings is governed by the same rules as obtain in the case of an original suit."

In *Barfield v. Zenith Tire & Rubber Co.* (*supra*), the District Court for the Northern District of Ohio, Western Division, sustained a motion to quash service of an ancillary bill filed by its Receiver against certain directors and stockholders of the corporation in receivership to recover from them the value of certain shares of stock alleged to have been fraudulently issued by the defendant directors to one of their own number, no one of said defendants to the said ancillary bill being a resident of the division or within the jurisdiction of the court when service was had of said bill. The Court in its opinion (p. 204) said:

> "In short the action is for a judgment against the defendants which is under no contingency whatever; one *in personam* attempting a recovery which, if had, would be definite and subject to no change because of subsequent developments in the main case. The question then is simply one of venue of an action at law, the subject-matter of which is within the court's jurisdiction, that is, whether the court having jurisdiction of the subject-matter, because of the ancillary character of the suit, may, by process served beyond the court's territorial jurisdiction, compel an individual to meet here an obligation which he may independently owe to the estate under administration; for we should treat these defendants, although alleged to be jointly and severally liable, as one individual."

Petitioners' entire argument is an attempt to avoid this issue, contending that Respondents, by filing their

proofs of claim in the Primary Cause, prior to the date of the filing of the so-called Ancillary Bill, had already submitted themselves to the jurisdiction of the Court, and had thereby waived their personal privilege under the statute.. Respondents submit that the District Court and the Circuit Court of Appeals committed no error in holding that the said Bill is an original Bill as to them, and hence requires the service of original process, and that Respondents, by filing their said proofs of claim, have not waived their personal privilege to be sued in the district whereof they are inhabitants.

(2) Petitioners' So-called Ancillary Bill of Complaint Is an Original Bill Against Respondents, Hence Requires Original Process.

As the District Court in its Memorandum Decision (R. 23), states and as the record shows, the said Bill of Complaint (R. 39), seeks to recover large sums of money from each of the Respondents. The Bill shows that each cause of action stated therein is *ex delicto,* being based on allegations of fraud, mismanagement or other acts equivalent thereto. The sole relief sought against each Respondent is a decree *in personam* for the payment of moneys.

The Circuit Court of Appeals in describing the said Bill in its opinion by Northcott, J., says, (R. 67):

> "The ancillary bill tendered for filing at that time alleged that claimants Hillman, Sheets and Watson as directors of Tower Hill had mismanaged the affairs of that corporation and had misapplied its assets in the payment of improper salaries and in the transfer of assets for the benefit of other corporations in which they were interested; that, as a result of their mismanagement, Hecla had re-

> ceived valuable property through an exchange with the Redstone Coal & Coke Co., to which Tower Hill was a party, and in the course of which Tower Hill had parted with property of great value and received property of insignificant value in return; and that the claim of the Hillman Company was based upon an arrangement between that company and Tower Hill growing out of the mismanagement of the latter by Hillman, Sheets, and Watson and that the Hillman Company was liable to the receivers for moneys which it had received pursuant to this arrangement. Most of the causes of action asserted in the ancillary bill appear not to have grown out of the transactions which were the basis of the claims filed with the receivers, but to constitute independent claims in behalf of the receivers against the claimants."

and holds that the said Bill is an original and not an ancillary proceeding, saying (R. 69):

> "And where an ancillary bill, as does the bill here, brings in new parties to the original suit and charges new matter as a basis of relief, the proceeding as against such new parties in an original, not an ancillary, proceeding, and they must be properly served with process to give the court jurisdiction. *Duan v. Clark,* 8 Pet. 1; *Smith v. Norfolk,* 115 U. S. 143, 148; *G. & C. Merriman Co. v. Saalfield,* 241 U. S. 22; *Manning v. Berdan,* 132 Fed. 382; *Bowers v. Christian,* 16 Fed. 729; *Hart v. Wiltsee, supra.*"

As the authorities in support of the ruling of the Circuit Court of Appeals on this proposition are so abundant, and as no attempt is made by counsel for Petitioners to refute them, it is unnecessary to do

more than call the Court's attention to the following leading cases, which emphasize that a clear and definite distinction is drawn between a purely ancillary bill and a bill which, though filed as a dependent or ancillary bill, is in reality an original bill requiring service of original process.

G. and C. Merriam Co. v. Saalfield, 241 U. S. 22, 60 L. Ed. 868, a relatively recent case, distinguishes an original from a supplemental or ancillary bill. The sole question involved was the jurisdiction of the District Court to make and enforce a decree *in personam* against the appellee, one Ogilvie, a non-resident by means of substituted service of an ancillary bill. Appellant contended that Ogilvie, though not a party to the original bill, by actively conducting, controlling and directing its defense had made himself privy to the suit and an actual though not a nominal party thereto, and was bound by the proceedings and decree therein.

Ogilvie's motion to quash the service of the bill and set aside the proceedings as against him was sustained. Mr. Justice Pitney in denying appellant's contention makes the following pertinent statements:

> "* * * *So far as the supplemental bill seeks to bring in Ogilvie as a new party and obtain relief against him, it is not, in any proper sense, dependent upon or ancillary to the original suit against Saalfield.*‡ * * * The object of the original bill was to obtain an injunction and recover profits from Saalfield; that of the supplemental bill is to obtain an injunction and an accounting of profits against Ogilvie respecting the same transactions. But the merits are not to be adjudicated against him until he is brought into court, and as against him the

‡ Italics ours throughout this Brief unless otherwise noted.

supplemental bill is an original, not an ancillary, proceeding. *But the merits are not to be adjudicated against him until he is brought in to Court, and as against him the supplemental bill is an original not an ancillary proceeding.* In *Duan v. Clarke,* 8 Pet. 1, 8 L. Ed. 845 * * * this court said * * * 'The injunction bill is not considered an original bill between the same parties, as at law: but, if other parties are made in the bill, and different interests involved, it must be considered, to that extent at least, an original bill; and the jurisdiction of the circuit court must depend upon the citizenship of the parties. In the present case, several persons are made defendants who were not parties or privies to the suit at law, and no jurisdiction as to them can be exercised by this or the circuit Court.' So far as it shows the distinction between an original bill and one that is not to be so considered, the case is in point upon the present question."

In *Smith v. Woolfolk,* 115 U. S. 143, page 148, 29 L. Ed. 357, 359, the Court says:

"So that, even if the decree made on the original bill was not final, the petition filed by Todd was so radical a departure from the case made and relief prayed by the original bill as to be a new suit and require service of process on the parties made defendant thereto. It instituted a new litigation on new and distinct issues not raised by the original pleadings, and between parties who were complainants in the original case.

* * * * * * *

"After a decree disposing of the isues and in accordance with the prayer of a bill has been made, it is not competent for one of the parties, without a service of new process or appearance, to institute

further proceedings on new issues and for new objects, although connected with the subject matter of the original litigation, by merely giving the new proceedings the title of the original cause."

In *Bowen v. Christian, et al.* (C. C. E. D. Mich.) 16 Fed. 729, a receiver appointed in a suit to wind up a partnership filed a bill in equity to set aside certain mortgages upon the partnership property as fraudulent and obtained an order for substituted service upon the attorney in fact for the mortgagees. The non-resident mortgagees appeared specially and moved the vacation of the said order and their motion was granted. Pertinent statements from the opinion of Mr. Justice Brown are the following:

"I am not aware that new parties, who are not connected in any way with the plaintiff in the original suit, can be brought into court in this way; * * * but if other parties are made by the bill, and different interests are involved, it is, as to them, an original suit and the jurisdiction of the court must depend upon their liability to be sued by the plaintiff, as in other cases.

"In this case defendants are not parties to the original suit. They are simply lien holders of the property in the possession of this court. This bill is clearly an original bill, since it relates to a matter not before litigated in this court by the same persons. As Mr. Justice Story says: *'Bills not original are those which relate to some matter already litigated in the court by the same persons, and which are either in addition to, or in continuation of, an original bill, or both.'*

"This bill is undoubtedly a continuation and carrying forward, to some extent, of the original suit, since, in order to fix the amount of McNichol's

interest in the partnership assets, it is necessary to determine the validity of these mortgages. But none of the parties to this suit are parties to the other. The bill is not less an original one because it happens to be an outgrowth of the other. It is not unlike cases where assignees in bankruptcy are compelled to file bills of a similar nature to set aside conveyances made by the bankrupt. In such cases the authorities are nearly uniform that the assignee must proceed, not by petition in the court of bankruptcy, but by bill in equity in the circuit or district courts against the fraudulent vendees or mortgagees. *Smith v. Mason,* 14 Wall. 419; *In re Marter,* 12 N. B. R. 185; *Bradley v. Healey,* 1 Holmes, 451."

Other authorities in point are: *Shainwald v. Davis et al.* (D. C. Cal.), 69 Fed. 701; *Gregory v. Pike* (C. C. A. First), 79 Fed. 520; *Manning v. Berdan et al.* (D. C., N. J.), 132 F. 382; *Rubber Co. v. Goodyear,* 76 U. S. 807, 19 L. Ed. 587. *Simkins Federal Practice* (Rev. Ed.), 756.

No argument is needed to show that the causes of action alleged in the Bill at No. 1434 in equity (Primary Cause), and those alleged at No. 3370 in equity (Ancillary Cause) are essentially different. The fundamental issue in the case at No. 1434 was whether the rights of the preferred stockholders were so imperilled by the management of the defendant as to warrant the appointment of a receiver to wind up its affairs. The issues now raised by the Bill at No. 3370 are whether the Respondents, Hillman, Sheets and Watson and the two Respondent corporations, are liable to Petitioners in damages by reason of their dealings with Tower Hill. The causes of action alleged in said Bill are not only the acts of fraud and mismanagement averred in the

former bill, but are based on other actions not theretofore complained of. The suits were brought by different parties complainant against different parties defendant, and no party in either suit was made a party to the other.

Causes of Action Asserted in Bill Are the Subject of Plenary Actions and Are Not Part of the Res.

A contested claim is not a part of the *res* which the court in a receivership proceeding is administering, but is the subject of a plenary action whether at law or in equity, and the Court has no inherent power to adjudicate the claim unless it has first secured jurisdiction over the person of the defendant.

In *Hart v. Wiltsee,* 19 Fed. (2nd) 903, (C. C. A. First), it is held that a proceeding to recover damages occasioned to a receivership estate through the alleged fraud of a committee of note holders of the corporation in the hands of a receiver should be a plenary one at law or in equity, as it was not one to recover property belonging to the receivership estate in the possession of the Committee but was for a *tort* to recover damages occasioned to the estate by the alleged fraud.

In *Wood v. N. Y. & N. E. R. Co.,* 61 Fed. 236 (C. C. D. Mass.), the Court which appointed receivers for the defendant Railroad Company held that it had no jurisdiction to grant relief on a petition in the nature of an injunction bill, filed in the original cause by the receivers against another Railroad Company, alleging unjust discrimination against the estate in receivership. The Court in that case says:

"They (the petitions of the receivers) do not relate to the administration of the insolvent estate, but to a disputed claim made on behalf of the estate. I do not think these proceedings come within the jurisdiction invoked by the present bill, * * *."

In *Railroad Credit Corporation v. Fruit Growers' Express Co.*, 71 Fed. (2nd) 218, the Court of Appeals of the District of Columbia held that a right of action arising out of a contract is not property which the court on appointing a receiver for a defendant corporation has taken into its possession. In that case the Court says (p. 219):

"* * * There is no doubt that the rule is that, when a court of competent jurisdiction has taken property into its possession, the property so taken is withdrawn from the jurisdiction of all other courts. But the applicability of the rule is not apparent here, for the subject-matter of this suit is not property in the sense in which the rule applies. It is no more than a debt due by the Express Company either to the pledgor or the pledgee of the shares of stock on which the dividend was declared, and its *situs* is outside the territorial limits of the receivership court. *In that aspect it is no more than a contested claim,* and we do not think the mere appointment of receivers makes it part of the *res* which the court is administering. In this view we think the demurrer should not have been sustained."

(3) The Proving of Claims Before a Special Master to Whom an Order of Reference Has Issued in a Federal Equity Receivership Proceeding Does Not Make the Claimant a Party to the Original Cause.

Petitioners' Brief (p. 18) states:

> "A court obtains jurisdiction of persons in either of two ways—by service of process or by submission. The former is not here claimed, * * *"

Petitioners' position is succinctly stated by Northcott, J. (R. 69), as follows:

> "The position of appellants is that these persons made themselves parties to the original cause by filing claims before the special master, and that no further service of process upon them, or consent to jurisdiction on their part, was necessary to give the court jurisdiction to award relief against them on the ancillary bill."

and effectively answered by the Court as follows:

> "The answer to this, however, is that under the federal practice a person does not, by filing a claim with a receiver, make himself a party to the original cause. *Elkins v. First Nat. Bank of the City of New York* (C. C. A., 4th) 43 Fed. (2d) 777; *Acme White Lead & Color Works v. Republic Motor Truck Co.*, 285 Fed. 88; *Jones & Laughlins v. Sands* (C. C. A., 2d) 79 Fed. 913; *Youtsey v. Hoffman*, 106 Fed. 693; *Sands v. Greeley Co.*, 80 Fed. 193; *Clark on Receivers*, vol. 1, page 717."

Northcott, J., in support of the Court's ruling that under the federal practice a party by filing a claim in a receivership proceeding does not make himself a party to the original cause, refers to *Whelan v. Enterprise*

Trans. Co., 164 Fed. 95 and *Youtsey v. Hoffman*, 108 Fed. 693. The facts and discussion therein he considers to be much in point and we respectfully refer this Court to Judge Northcott's discussion of these two cases (R. 69-71). In addition to the authorities cited by him, this Court's attention is called to two cases decided by the Circuit Court of Appeals for the Ninth Circuit which further sustain the rule as stated by the Fourth Circuit.

In *International Banking Corporation v. Lynch*, 269 Fed. 242, 246, the Appellate Court held that a creditor by filing its proof of claim with the receivers, pursuant to the district court's order, did not become a party to the cause and subject to a restraining order *previously* entered. The Court in its opinion (p. 246) says:

> "The filing with the receiver of the sworn statement of the appellant Banking Corporation's account against the insolvent debtor could not operate to make the appellant bound or in any way affected by the restraining order made by the court months before; it was in no sense a pleading in the case, its only function being to inform the receiver of the amount it would be necessary for him to pay in order to redeem the pledged securities and to acquaint him with what the appellant might be entitled to receive, if anything, out of the general assets of the insolvent estate should the securities held by the appellant fail to realize the total amount due it."

In *Lucey Manufacturing Corporation v. Morlan*, 14 Fed. 2d 920, an action at law had been brought in the state court of California (then removed to the District court for the Southern District of said state) by one Morlan, an assignee for certain creditors of Lucey Manufacturing Corporation, a New York corporation for whom

Receivers had been appointed in the United States District Court for the Southern District of New York prior to the date of the entry of the suit. Morlan, upon filing the complaint in the State Court, attached defendant's tangible property in California. Lucey Company filed an answer to the complaint, in which one of the defenses set up was that some of its creditors for whom Morlan was assignee and whose claims were being prosecuted, had filed proofs of claim in the New York federal proceeding, pursuant to an order directing the filing of the claims and had thereby elected to become parties to that proceeding and could not seek preference by attachment in California. The case was tried without a jury and judgment entered for the plaintiff, which on appeal was affirmed, Hunt, C. J. in his opinion saying:

> "We are unable to uphold the contention that the effect of filing claims with the Receivers made the creditors who filed parties to the New York proceedings, and bound them by the decrees that had been made in such proceedings."

That the proceeding before the Special Master is merely a proceeding in aid of and therefore ancillary to the main cause, to wit, the proceeding at No. 1434 in Equity, wherein Receivers were appointed for Tower Hill, the sole defendant therein named, is too clear to admit of any extended argument. Judge Northcott in his former opinion in this case, 64 Fed. (2nd) 817, held that parties who should appear before the special master to receive a portion of the assets of the defendant corporation belonging to them would thereby become parties to the suit *pro hac vice* only. In holding that Tower Hill itself was the only indispensable party before the court, for the purposes of having Receivers appointed for it, Judge Northcott says:

"As under the decree defendant's assets come into the possession of the receivers, and the *distribution* is to be made according to the rights of the creditors and stockholders, the proceeding will be one in aid of the main suit, and all parties will have notice and will be afforded full opportunity to be heard on all questions arising as to such distribution."

And again he says:

"After dissolution is decreed, they can come in and receive the portion of the assets belonging to them and make themselves parties to the suit *pro hac vice,* but this does not defeat the jurisdiction, for this is what happens in every receivership case."

In *Elkins v. First National Bank of the City of New York,* 43 Fed. (2nd) 777, the Circuit Court of Appeals for the Fourth Circuit in an opinion by Judge Parker, says on page 779:

"It is not the ordinary or proper procedure in a receivership proceeding to allow claimants who can have their controversies settled before a master with right of review by the court *to be made parties to the original cause* and thus complicate the issues there involved. *Acme White Lead & Color Works v. Republic Motor Truck Co.* (D. C.) 285 F. 88; *Jones & Laughlin v. Sands* (C. C. A. 2nd) 79 F. 913; *Sands v. Greeley Co.* (C. C.) 80 F. 195."

All of the cases cited sustain the proposition enunciated therein, to wit, that claimants against an estate in receivership will not be allowed by intervention to become parties to the primary cause where their rights may be conserved by proving their claims before a special master appointed in said cause for the purpose of

hearing and determining the validity of such claims, in which event, as Judge Northcott has so well said in the former opinion in this case: "they become parties to said cause *pro hac vice.*"

Intervention in federal equity proceedings and the effect thereof is specifically covered by Equity Rule 37; and that one does not become a party to a suit by appearing before a master for the purpose of proving a claim, and that there is a clear distinction in effect between the presentation of claims before a master in a receivership proceeding and an intervention in such proceeding is also brought out in *Clark on Receivers,* Vol. 1, Chapter 18, entitled "Intervention". On page 717, Sec. 532 (c), Clark says:

> "(c) DISTINCTION BETWEEN INTERVENTION AND PRESENTATION OF CLAIMS. When a special receiver is appointed of part of the property of a defendant, individual or corporation, any one claiming an interest in such property should generally intervene in the case, become a party, file a motion or petition *pro interesse suo,* or file a dependent or ancillary bill.
>
> "However, when a general receiver is appointed of the property of an individual or a corporation with the ultimate purpose of distributing such property among creditors and others entitled to receive the property, the court will generally make an order *inviting* claimants to present their claims duly approved to the receiver.
>
> "The presentation of the claims does not make the party presenting the claim, strictly speaking, a party to the suit in which the receiver is appointed, but the effect of presenting such claim properly verified and proved is to give the receiver notice of such claim. Having notice of such claim the re-

ceiver under orders of court cannot properly make distribution without taking such claim into consideration. * * *

"Although a court invites claimants to present their claims to the receiver to be heard by the receiver or a special master, this does not of itself prevent a claimant from intervening. However, the court may in its discretion, refuse permission to intervene when it is perfectly apparent that a claimant's rights may all be equitably and fairly adjudicated and adjusted through presentation of his claim to the receiver. (See matter discussed at length this chapter under section 532.)"

Again Clark, in dealing with the subject of *Procedure on Intervention,* in Section 533 (c), page 724, says:

"(c) INTERVENOR A NEW PARTY. An intervenor in a receivership who is admitted to the suit to become a party plaintiff, or defendant and who sets forth a claim supplementing the main plaintiff's claim, or setting forth a defense which supplements the main defense, should have the standing in court of a party to the suit in the full sense of the word.

"On the other hand, one who files a claim against the receivership under an order of court authorizing claims to be filed, only becomes a quasi-party and one who intervenes and files a claim without setting forth, any cause of action further than filing such claims has not the standing in court of one who sets forth a full cause of action."

Continental Trust Co. v. Toledo, St. L. and K. C. R. Co., 82 Fed. 642, decided by the late Mr. Chief Justice Taft, when Circuit Judge, whose opinion is quoted with approval by Mr. Justice Lurton, for the Circuit Court of

Appeals of the Sixth Circuit, 95 Fed. 505, is a case in which creditors' bills had been filed against the defendant railroad company, a consolidated corporation under the laws of Illinois, Indiana and Ohio, for the appointment of receivers to take charge and operate a railroad in three jurisdictions. Various creditors of the company filed intervening petitions, among them the owners of certain bonds issued by the company and secured by a mortgage on its property. Subsequently the trustee under the mortgage filed a foreclosure bill and an order was made consolidating the creditors' suit and the foreclosure suit. Thereafter in the creditors' suit intervening petitions were filed attacking, among other things, the validity of the bonds and a motion was made to dismiss the foreclosure bill for want of jurisdiction, on the ground that the necessary diversity of citizenship between the complainants and the defendant, as shown on the face of the bill, did not exist. Judge Taft in denying the motion on page 645 says:

> "* * * The foreclosure bill stated the fact that the railroad, the mortgage on which was filed to foreclose, was in the hands of this court. That was the jurisdictional fact, and made immaterial the circumstances that one complainant was a citizen of New York and the other of Indiana, and that among the defendants were citizens of Indiana and New York. It cannot be of importance that the bill was apparently filed as an independent bill. If in fact the only way of maintaining jurisdiction of it is as a dependent bill, ancillary to the creditors' action, it is the duty of the court so to treat it, provided it appears, as it does, that it can be maintained as such. ***But care must be taken not to give too much effect to the dependence of one suit on the other for jurisdictional purposes. Such dependence does not***

throw both suits into hotchpot, and dispense with the ordinary rules of pleading and practice as to parties proper and necessary to each cause of action. Because the res acquired under the original bill gives ancillary jurisdiction to entertain a dependent bill seeking relief in respect of the res, parties to the original bill are not thereby made parties to the dependent bill. The parties to the original bill have no more right to intervene in the dependent cause than if the court had independent jurisdiction thereof."

Counsel for Petitioners have not cited a federal case and Counsel for Respondents have been unable to find one which holds that, under the federal practice, the filing of a proof of claim in a receivership proceeding makes the claimant a party generally to the original cause for all purposes.

Counsel for Petitioners would minimize the force of Judge Northcott's opinion that Respondents had not made themselves parties to the original cause by presenting their claims to the Special Master, quoting his opinion as saying that the said claims were filed with the Receiver, thereby seeking to differentiate between presenting a claim to a receiver and presenting it to a special master on an order of reference (Petitioners' Brief, 50, 51, 54). That the Circuit Court of Appeals was fully aware that the Proofs of Claim had been presented to the Master is apparent not only from the record but from the opinion (R. 67), wherein the fact is expressly recited. The Court, however, properly makes no distinction between these two methods of presenting claims in a receivership estate and it seems unnecessary to do any more than point out the fact that the distinction is one in which there is no real difference, the mat-

ter of the presentation of the claims being merely a question of mechanics which different courts apply according to their practice or the circumstances of the particular case. In the Youtsey case, the claim had been referred to a special master. In other cases cited by Judge Northcott the claims had been presented to the receiver. As will be observed from the previous quotations from *Clark on Receivers*, the writer, in discussing the difference between the effect of the presentation of claims in a receivership proceeding and intervention in the original cause, makes no distinction between filing the claim with a receiver and presenting it to a special master.

Petitioners in commenting on the cases cited by Judge Northcott, in support of the proposition enunciated in this branch of the argument, attempt to distinguish *Elkins v. First National Bank, Acme White Lead & Color Works v. Republic Motor Truck Co., Jones & Laughlin v. Sands and Sands v. Greeley Co., supra*, on the ground that in each of these cases the question resolves itself into merely a question of procedure. While the question of jurisdiction was not directly involved in these cases, they are directly in point. The question at Bar is whether Respondents being required, at the risk of forfeiting their rights, to comply with the invitation and order of court and present their claims in the Receivership proceeding, by so doing became parties to the original cause and thereby gave the Court jurisdiction over them to adjudicate the causes of action *thereafter* brought against them by the so-called Ancillary Bill. The cases cited are pertinent because they define in law the status of one who files a claim with a receiver or special master in a federal equity receivership and hold that by so doing he does not become a party generally to the cause but merely a party *pro hac vice*.

Petitioners seek to minimize the effect of *Youtsey v. Hoffman,* 108 Fed. 693, discussed in the opinion of Judge Northcott, on the ground that the decision of that case rested on the theory that receivers are not parties. On the question of parties the case holds (pp. 695 and 696) that Hoffman

> "by proving and filing his claims before the commissioner of that court, had become, as to them, at least a *quasi* party to that suit; but, as the receiver in the case—the mere officer of the court—was not then a party to the suit, it is clear that the permission given to him to file an answer and set-off in a suit to which he was not previously made a party was altogther unauthorized and irregular."

It appears in the earlier part of the opinion that the permission of the receiver to file his so-called answer and set-off had been granted without notice to Hoffman. The opinion further holds (p. 696) that

> "as there were new and distinct claims stated and set up in the so-called answer and set-off of the receiver, which had no connection with Hoffman's claims, due process of law manifestly required that actual notice, in the way of a service of a summons, should be given to Hoffman, in order to bring him before the court upon that pleading."

So in the case at Bar while the Receivers of Tower Hill had power and were under duty to appear before the Special Master to object to the allowance of the questionable claims presented to the Special Master and to defend the same on behalf of the corporation, they did not thereby become parties to the original cause any more than did the Respondents become parties thereto by filing their proofs of claim. Counsel for Respondents have never conceded, as Petitioners claim, that the

Receivers of Tower Hill were parties to the original cause and are unable to find in the record any support for the claim that they have been so recognized by the Circuit Court of Appeals. Nor does the *Youtsey* case hold, as Petitioners contend, that the claims attempted to be set off by the receiver were under the Kentucky Statutes not counter-claims or set-offs. The Court merely holds that there was no authority under the Kentucky Statutes for permitting a receiver as such and without being made a party defendant to a suit to file a counter-claim or set-off, of which the other parties to the cause of action were required to take notice without the regular service of process. The Court in its opinion on page 696 says:

> "There does not, indeed, appear to be anything in the Civil Code of Practice of Kentucky which makes or expressly authorizes the making of the court's receiver as party to the cause as a litigant therein, and certainly there is no authority in the Code for permitting the receiver, merely as such, and without in fact being made a party defendant, to file a counter-claim or set-off, of which other parties to the cause are required to take notice without a regular service of process thereon. He may, of course, as already shown, sue in his own name, in bringing any plenary action of his own, but no one except an actual party defendant can file a set-off."

The decision on this branch of the case could have been sustained, we submit, without the necessity of referring to the Civil Code of Kentucky.

Counsel for Petitioners would also minimize the authority of *Whelan v. Enterprise Trans. Co.*, 164 Fed. 95. They say (Petitioners' Brief, 52): "The court

there declined to follow *Peck v. Elliott, supra,* because the counter-claim was a legal one and not cognizable in equity."

While Lowell, J., held that the receiver's action against Paige was one cognizable at law, it is manifest from a reading of this opinion that the question whether the receiver's claim against Paige was cognizable at law or in equity was deemed immaterial, and that the real question at issue was whether Paige was right in his contention that by presenting his claim in the court of equity which had appointed the receiver he had not thereby brought himself within the jurisdiction of that court, for the purpose of the collection of the receiver's claim against him. The court in its opinion (p. 454) says:

> "The court has next to consider if the fact that Paige filed a claim against the estate in the hands of a receiver appointed by a court of equity brings him within the jurisdiction of that court of equity for the purpose of the collection of the receiver's claim against him. That Paige cannot obtain as matter of right a jury trial concerning his claim against the estate may be admitted, but from this it does not follow that he waives his right to a jury trial in case of a claim brought by the receiver against him, where that claim is made, not by way of set-off, but for the purpose of taking money out of Paige's pocket. Upon the whole, I think that Paige is right in this contention also" (pp. 98 and 99).

If, as Judge Taft says, parties to an original bill are not thereby made parties to a dependent bill and have no more right to intervene in a dependent cause than if the court had independent jurisdiction thereof, it must follow that parties to a dependent or ancillary

proceeding, such as claimants appearing before a special master in a receivership, do not thereby become parties to the original cause much less do they become parties to another dependent or ancillary proceeding growing out of the original cause, particularly to a bill which though called "ancillary" is in reality an original bill.

In every federal court in which the question has been discussed it has been held that the presentation of claims in a receivership proceeding does not make the claimant a party to the cause.

In bankruptcy proceedings where the powers of the referee with respect to the adjudication of claims are very similar to those of a special master in a receivership proceeding such as this (the powers of the referee being limited by Statute, those of the master by the order of reference under the Federal Equity Rules), it has been held that, notwithstanding a creditor has filed a proof of claim in a bankruptcy proceeding, the court is without jurisdiction in said proceeding to enter a personal decree against him over his objection and further that the trustee cannot take advantage of the filing of a proof of claim as a consent to the jurisdiction of the court in a separate suit brought by the trustee against the claimant.

In *Fitch v. Richardson,* 147 Fed. 197 (C. C. A. First), we quote the following from the *syllabus*:

> "A court of bankruptcy, on rejection of proof of a claim on the ground that the creditor held security therefor, is without jurisdiction to value the security and enter a decree against a creditor over his objection for its excess value over the debt, although he claimed the security as his own property."

In *Tate v. Brinser,* 226 Fed. 878 (D. C. Pa.), a suit in equity by a trustee of the bankrupt estate against the defendant was dismissed for want of jurisdiction, over the trustee's contention that the District court has acquired jurisdiction over the defendant by virtue of the fact that he had filed a proof of claim against the bankrupt estate and attempted to vote the same. The following language from the opinion is particularly applicable to the case at bar, for there as here the defendant had filed a proof of claim *before* he was confronted with any action by the trustee. The court in its opinion on page 883 says:

> "And it cannot be said that the proof of claims against a bankrupt and the voting or attempting to vote them amounts to consent under section 23, subdivision (b) * * * *When these claims were proven and attempted to be voted, Brinser was not confronted with any such action.* There was no such action. The moment he was confronted with the action he promptly challenged the jurisdiction and has persisted in that challenge ever since. The court being without authority to take jurisdiction in this matter and being equally satisfied that the conduct of Brinser in proving his claim in bankruptcy does not amount to consent of jurisdiction, the bill must be dismissed."

(4) Respondents by Filing Their Proofs of Claim in the Receivership Proceedings Have Not Waived Their Personal Privilege Under Section 51 of the Judicial Code.

(a) *Nature of the Privilege.*

Since Respondents were not parties to the Primary Cause and did not become parties thereto by filing their proofs of claim, since the so-called Ancillary Bill is in reality an original bill and since Respondents in the Motions filed by them to vacate the Order of Court entered February 19, 1934, in the Primary Cause and to dismiss the so-called Ancillary Bill of Complaint filed in the Ancillary Cause exercised their privilege under Section 51 of the Judicial Code to be sued in the district whereof they are inhabitants on the claims alleged in the said Bill, the propriety of the decrees of the Circuit Court of Appeals would seem so obvious as to require no further argument. This Court has repeatedly held that the right of a defendant to be sued in his own district in any civil suit is absolute. *Munter v. Weil Corset Co.*, 271 U. S. at 279, 67 L. Ed. 654; *Pacific Mutual Life Ins. Co. v. Tompkins*, (C. C. A. 4th), 101 Fed. 539 (cert. den. 179 U. S. 683).

The privilege of a non-resident defendant to be sued in the district whereof he is an inhabitant is a personal privilege which he may exercise or waive at his election. If he waives the same, such waiver must arise out of some act or thing done by him which evidences his clear intention to submit himself to the jurisdiction of the court wherein the suit is brought, such as a general appearance, a plea to the merits, or some other unequivocal act by which he consents to an adjudication by the Court of the merits of the suit wherein he is named defendant.

Citizens S. & T. Co. v. I. C. R. R. Co., 205 U. S. 46, 51 L. Ed. 703.

Big Vein Coal Co. of W. Va. v. Read, 229 U. S. 31, 57 L. Ed. 1053.

Butterworth v. Hill et al., 114 U. S. 128, 29 L. Ed. 119.

Camp v. Gress, 250 U. S. 308, 63 L. Ed. 997.

Grable v. Killits (C. C. A. 6th), 282 Fed. 185, 195.

Dahlgren v. Pierce (C. C. A. 6th), 263 Fed. 841, 846.

Stonega C. & C. Co. v. L. & N. R. Co., 139 Fed. 271 (C. C. W. D., Va.).

Pacific M. L. Ins. Co. v. Tompkins, 101 Fed. 539 (C. C. A. 4th Cir.).

Fulton v. Ramsey, 67 W. Va. 321, 66 S. E. 381.

Petitioners would have this Court hold that Respondents have waived service of process of the so-called Ancillary Bill of Complaint on the theory that Respondents, prior to the institution of the suit, had already submitted themselves to the jurisdiction of the District Court to hear and determine the issues raised therein, because they, on the "invitation" of the Court and under penalty of forfeiting their claims, had filed proofs thereof with the Special Master in a proceeding before him in aid of the Primary Cause. They would extend Respondents' appearance before the Special Master *pro hac vice* to a *general appearance* in the District Court *in any and all cases Petitioners might see fit thereafter to bring against them.* They would make the filing of the proofs of claim before the Master operate as a *blanket waiver* of Respondents' privilege to immunity from service of process before they knew that they might at some future date be placed in a position where they should avail themselves of that right. We submit that Respondents may not be so lightly divested of their right and that

this Court will look with no more favor than did the Courts below on Petitioners' contention.

(b) *Respondents Have Not Waived Their Privilege.*

Petitioners contend Respondents have waived their personal privilege because, they say, Respondents voluntarily invoked the jurisdiction of the District Court to adjudicate the claims which they presented before the Special Master and that, therefore, their position is precisely the same as one who voluntarily selects a forum and files a bill in equity. The weakness of this argument and the vice inherent in it is effectively pointed out in the opinion of Judge Northcott. We quote from his opinion (R. 71, 72) the following:

> "It is argued that the court has jurisdiction of the parties to pass upon the matters set up in the ancillary bill, because it is said that a claimant, by filing claims with a receiver and invoking the jurisdiction of the court for the adjudication of that claim, consents that the court adjudicate any claim which the receiver may have against him. The case is said to be analogous to a suit in equity in which the complainant, by filing the suit against the defendant, impliedly consents to being sued by way of counterclaim in a court which would not otherwise have jurisdiction of the cause of action therein asserted. See Equity Rule 30; *Texas Co. v. Borne Scrymser Co.* (C. C. A., 4th), 68 Fed. (2d) 104; and *General Electric Co. v. Marvel Rare Metals Co.*, 287 U. S. 430, in the last of which the Supreme Court said: *'The setting up of a counterclaim against one already in a court of his own choosing is very different, in respect to venue, from hailing him into that court.'*

"One filing a claim with a receiver, however, is in a very different position from one who has filed a bill in equity. He is not in a court of his own choosing, but in a court selected by others, which has taken into its possession the only property from which he can obtain payment of his claim. The complainant who files a bill in equity, and thus subjects himself to equitable counterclaims of the defendant, has had the option of going into either the state or federal courts and of suing in any district in which jurisdiction of the defendant can be obtained. The claimant who files claim with a receiver, on the other hand, has had no option whatever. Unless he promptly files his claim with the court which has taken jurisdiction of the property, his right to share in the distribution of that property will be gone; and that court passes upon his claim, without regard (fol. 84) to citizenship, the amount involved, or other jurisdictional requirements, merely because of the necessity arising out of the fact that it has taken possession of property. The claimant in such case files his claim in the receivership suit in order that he may obtain his equitable portion of the property in receivership upon its distribution by the court; and, as we said in a former opinion herein, he makes himself a party to the cause *pro hac vice*, *i. e.*, merely for the purpose of having his claim allowed and of sharing in the distribution of the property in which he claims an interest because of the receivership. He has an equitable interest in the property which is in the hands of the receiver; and his position, in so far as coming into the receivership suit for the assertion of his rights is concerned, is more nearly analogous to that of a person whose property has been attached, and who must appear and defend for the

protection of his interest in the property, than to that of a complainant who has voluntarily gone into a court and filed a bill in equity. To permit the receiver to assert in the receivership suit an independent cause of action at law or in equity against such claimant, or to recover on a counterclaim against him merely because he has filed his claim in the receivership suit, would be as unfair as to permit a plaintiff in an attachment suit to amend his complaint to allege a new and different cause of action against a defendant in attachment, or to permit a non-resident, who has appeared to defend a suit on one cause of action, to be subjected while in the jurisdiction to suit on another and independent cause of action. It is well settled that, in an attachment suit, it is not permissible to amend the pleadings to set up a new cause of action (*6 C. J.* 482), and that one who comes into the jurisdiction of a court for the protection of his interest in litigation there pending is immune from service of process in another suit. *Page Co. v. McDonald,* 261 U. S. 446; *Stewart v. Ramsey,* 242 U. S. 128."

Petitioners contend "Whether Respondents would go in or stay out of the District Court was purely volitional. If it be said that they would have stayed out at the risk of losing their claims, the answer is that they would have been in no different position than any other suitor." (Petitioners' Brief 54). For the Court to so hold however, as Judge Northcott points out, would be patently unfair and unjust, for Respondents did not appear in a court of their own choosing but because they had no option in the matter. They must either present their claims in the receivership proceeding or forfeit the same. They were not "actors" or movants as they did not take the initiative at any time in any of the pro-

ceedings. They were defending, not prosecuting, their claimed rights. There is no difference in principle or effect between the condition of one notified to appear and show a right claimed by him or forfeit it and that of one duly summoned to appear and defend an action or suit against him under penalty of judgment or decree by default. A voluntary plaintiff may have a narrow choice in respect of a forum, but he has some choice. Respondents had none.

Furthermore the Respondents presented their claims on "the invitation" of the Court and for its "information" and guidance in the proper distribution of the proceeds of the assets in its custody, in compliance with an order which warned them that if they failed to present their claims before the Master, they would be barred from thereafter asserting the same. The privilege exercised in this instance was not one asserted by claimants but one which the court itself had extended to them and which this Court, in most impressive language, has declared shall not be taken advantage of for the purpose of oppressing or harassing the one to whom it is extended.

Stewart v. Ramsey, 242 U. S. 128, 61 L. Ed. 192, is particularly applicable to the case at bar. In that case this Court, in holding that suitors, as well as witnesses, who come from another state or jurisdiction are exempt from service of civil process while in attendance upon court, speaking through Mr. Justice Pitney (pp. 129, *et seq.*) says:

> "A leading authority in the state courts is *Halsey v. Stewart*, 4 N. J. L. 366, decided in the New Jersey supreme court nearly one hundred years ago, upon the following reasoning: 'Courts of justice ought everywhere to be open, accessible, free from

interruption, *and to cast a perfect protection around every man who necessarily approaches them.* The citizen in every claim of right which he exhibits, and every defense which he is obliged to make, should be permitted to approach them, not only without subjecting himself to evil, but even free from the fear of molestation or hindrance. * * * It is often matter of great importance to the citizen, to prevent the institution and prosecution of a suit in any court, at a distance from his home and his means of defense; and the fear that a suit may be commenced there by summons will as effectually prevent his approach as if a *capias* might be served upon him.' * * *

The opinion (p. 130) quotes with approval the following language from *Parker v. Hotchkiss* (1849) 1 Wall Jr. 269, Fed. Case No. 10739:

'The privilege which is asserted here is the privilege of the court, rather than of the defendant. It is founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify. Witnesses would be chary of coming within our jurisdiction, and would be exposed to dangerous influences, if they might be punished with a lawsuit for displeasing parties by their testimony; and even parties in interest, whether on the record or not, might be deterred from the rightfully fearless assertion of a claim or the rightfully fearless assertion of a defense, if they were liable to be visited on the instant with writs from the defeated party.' "Since this decision, the

Federal circuit and district courts have consistently sustained the privilege."

In *Read v. Neff, et al.;* 207 Fed. 890, (D. C. S. D. Iowa), the Court (page 891), says:

"This court is open to all litigants who can make averment of jurisdictional facts. He had the perfect right to come to this court and look after his case, aid in the management thereof, and give his testimony. This is not denied. *But it is contended that, if he did elect to come, he must come with a club over his head, terrorizing both him and all other litigants of like position. This is unsound and utterly at variance with the undoubted right of all such litigants to personally present their case, either alone or with the aid of lawyers. And, if litigants coming from another state come at the peril of being sued, many would not come.* And this is true whether such litigant is to be sued on a just cause of action or is to be sued in vexatious litigation without merit."

(c) *Discussion of Authorities Cited by Petitioners.*

Counsel, for Petitioners, in support of their contention, that the inerrant test of what constitutes a general appearance is whether one has become an actor in the cause, have cited certain authorities, an analysis of which discloses that the case cited is one in which the particular act of the defendant, of which advantage was sought to be taken as constituting a general appearance was held not to be such; or one in which the defendant had filed a counter-claim which he was not bound to plead; or had otherwise affirmatively invoked the jurisdiction of the Court in the *particular* suit which he was defending.

In *Wabash Western Ry. Co. v. Brown,* 164 U. S. 271, 278, 41 L. Ed. 431, 434, this Court held that the filing of a petition for removal did not amount to a general appearance but to a special appearance only.

In *Merchants Heat & Light Co. v. James B. Clow & Sons,* 204 U. S. 286, 51 L. Ed. 488, the question at issue was whether in an action at law a defendant, a foreign corporation, had waived its right to question the jurisdiction of the court, on the ground that the service upon it was invalid, when in its answer on the merits, and after it had saved its right to question the court's jurisdiction, it went further and it set up a demand in recoupment which it was not bound to plead. The case has no analogy to those at Bar.

Petitioners while claiming that case "is identic in principle with that of the one at Bar", yet point out the fundamental difference between the cases. In their discussion of the case (Petitioners' Brief p. 21) they say "the lone respect in which the case * * * differs from the one at Bar is that in the former the defendant was not bound to plead the counter-claim, while here the Respondents if they elected to enforce their claims were bound to come into the District Court". In that case this court speaking through the late Mr. Justice Holmes whom Petitioners quote (Petitioners' Brief p. 20) says "* * * the authorities agree that he (defendant) is not concluded by the judgment if he does not plead his cross demand and that whether he shall do so or not *is left wholly to his choice*". In the cases at bar Respondents admittedly had no choice but to prove their claims, otherwise they would have been barred from thereafter asserting the same. By what process of reasoning can it be said that they, in the words of Justice Holmes, thereby became actors *"in a proper*

sense" when they submitted their claims in the receivership proceeding.

In *Fisher v. Shropshire,* 147 U. S. 133, 37 L. Ed. 109, a bill in equity to enforce a vendor's lien was removed from the state into the federal court by the defendant who, having done so, contended that the latter court had no jurisdiction because another party was an indispensable party defendant and was a citizen of the same state as the complainants. The Court held, in the language quoted in Petitioners' Brief (p. 20) that, having voluntarily invoked the jurisdiction of the court he could not thereafter deprive it thereof.

Commercial Electric Supply Co. v. Curtis, 288 Fed. 657 (C. C. A. 8th) was a case of intervention where the intervenor who had made himself party plaintiff in the particular case was held bound by all of the decrees entered in that case thereafter and does not decide any of the questions now before the Court.

In *Rouse v. Letcher,* 156 U. S. 47, 39 L. Ed. 341, Letcher filed an intervening petition against the Receivers of a Railroad company, in a suit for the foreclosure of a mortgage on the railroad, to recover damages for alleged negligence of the company's employees. Her petition was granted, her case was referred to a special master who reported a judgment in her favor against the receivers. It had no bearing on the case at Bar.

Stewart v. Dunham, 115 U. S. 61, sustains Respondents' proposition that the presentation of a claim before a special master in receivership proceedings does not make the claimant a party to the litigation.

The pertinent facts and the Court's opinion thereon (page 64) are as follows:

> "The appellants assign as error, that the court proceeded to decree, after admitting Katz and Barnett and John I. Adams & Co., as co-complainants, alleging that, as the case then stood, it was without jurisdiction, as the controversy did not appear to be wholly between citizens of different States. This, of course, could have furnished no objection to the removal of the cause from the State court, because at the time these parties had not been admitted to the cause; and their introduction afterwards as co-complainants did not oust the jurisdiction of the court, already lawfully acquired, between the original parties. The right of the court to proceed to decree between the appellants and the new parties did not depend upon difference of citizenship; because, the bill having been filed by the original complainants on behalf of themselves and all other creditors choosing to come in and share the expenses of the litigation, the court, in exercising jurisdiction between the parties, could incidentally decree in favor of all other creditors coming in under the bill. Such a proceeding would be ancillary to the jurisdiction acquired between the original parties, and it would be merely a matter of form whether the new parties should come in as co-complainants, or before a master, under a decree ordering a reference to prove the claims of all persons entitled to the benefit of the decree. *If the latter course had been adopted, no question of jurisdiction could have arisen. The adoption of the alternative is, in substance, the same thing.*"

The Court in the last sentence of the foregoing paragraph plainly says that had the creditors, instead of

intervening, filed their claims before the special master, they would *not have become parties to the suit* and no question of jurisdiction could have arisen. Reasoning from that premise, it holds that after the court had once acquired jurisdiction on the ground of diversity of citizenship, in the exercise of its jurisdiction it can *incidentally* decree in favor of all other creditors coming in *under* the bill, but that this proceeding is an ancillary one, and creditors so coming in *do not thereby become parties to the original bill* and thus divest the court of jurisdiction.

Massachusetts Bonding and Insurance Co. v. Concrete Steel Bridge Co., 37 Fed. (2nd) 695, is an action at law, the facts in which have not the remotest similarity to those in the cases at Bar. The case holds that the State Auditor of West Virginia, having an official residence in the Southern District of West Virginia, was authorized to accept service of process on a foreign corporation issued from the District Court of the Northern District in a case where all other jurisdictional requirements had been met under the West Virginia Code. It further appears that, after appearing specially to question the Court's jurisdiction, the defendant answered and pleaded to the merits.

In *Dailey Motor Co. v. Reaves*, 184 N. C. 260, 114 S. E. 175, 176, the excerpts from the opinion quoted by Petitioners obviously shows that the Court's statement that "If a defendant invoke the judgment of the court in any manner upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general" is confined to the Court's jurisdiction to hear and decide the *particular* controversy in which the appearance is entered.

In *Fulton v. Ramsey,* 67 W. Va. 321 (66 S. E. 381), it is apparent from a reading of the opinion that all that the Court was deciding was the effect of an appearance in the *particular* case before the court. The Court there says:

> "It must be an appearance for a purpose *in the cause, not merely one collateral to it.* The test according to *Merchants H. & L. Co. v. Clow & Sons,* 204 U. S. 286, is whether the defendant became an actor *in the cause. Citizens Sav. & Tr. Co. v. R. R. Co.,* 205 U. S. 46. * * * *The appearance must have some relation to the merits of the controversy.*"

In *Newman v. Moore,* 94 Ky, 147, a married woman in conjunction with her husband covenanted to convey land to one Lowe. A part of the purchase price was paid in cash, and the balance in notes, which came into the hands of one Newman. Thereupon she put the purchaser in possession but refused to convey title. On a bill in equity filed against her by the vendee, Newman filed a cross petition to recover on his notes. She insisted that, as she had not been summoned on Newman's cross petition, he was not entitled to any relief against her. The court, however, says:

> "But she filed exceptions in open court to the Commissioner's report fixing the amount coming to Newman, which were sustained by the Court, and as she thus took part in the trial and by her exceptions combatted the claim set up in Newman's objections she cannot be allowed to say she was not in court. * * * We think she thereby entered her appearance."

In *Hartford Accident Indemnity Co. v. Southern Pacific Co.,* 273 U. S. 207, 71 L. Ed. 612, this Court on a writ of certiorari affirmed the Circuit Court of Appeals

affirming the judgment of the District Court denying a petition for liability in an admiralty proceeding arising in the District Court. The quotation from the opinion cited as to the general power of a court of equity which has obtained jurisdiction over some portion of a controversy to decide the whole issue and award complete relief is not controverted, but the case has no analogy to the one at Bar and the question in venue is not involved.

Petitioners have also cited certain West Virginia authorities which, they say, hold that creditors by filing their claims before a commissioner appointed in a suit to hear and report on claims makes the claimants parties to the main cause and amenable to the jurisdiction of the court in all other litigation growing out of the said main cause.

In answer thereto, Respondents submit that the practice in the federal courts is controlled by the Federal Judicial Code and the Equity Rules promulgated by this Court and that the decisions of the Supreme Court of West Virginia interpreting the statutes of that State relative to practice and procedure in the state courts are not authoritative.

However, in not one of the West Virginia cases cited does the Supreme Court of West Virginia say that *affirmative* relief can be obtained against the creditor filing his claim before a commissioner in proceedings on a creditor's bill without the issuance of an original process.

Further discussion of these cases may be found in the Appendix hereto.

(5) Equity Rule 30 Has No Bearing on the Question Involved in the Cases at Bar.

Petitioners seek to sustain the jurisdiction of the District Court to adjudicate the claims set up in the so-called ancillary bill of complaint without service of process thereof upon the Respondents by resorting to Equity Rule 30. Petitioners' entire argument upon this point is summed up in the following quotation from Petitioners' Brief (pages 31 & 32):

> "Since Respondents, by assertion of their claims in the receivership proceeding, are seeking affirmative relief against the *res*, their demands, without regard to the form in which they are cast, *are in essence bills in equity against Tower Hill*, and the Ancillary Bill, notwithstanding its form, *is likewise in essence an answer* setting up counterclaims, which, although they might have been the basis of an *independent bill*, are still within the express terms of Equity Rule 30."

Unless this Court should hold that the Circuit Court of Appeals committed error in holding that under the federal practice a person does not by filing a claim with a receiver make himself a party to the original cause and that by such action he enters a general appearance not only in said cause but in any and all other suits which the receivers may thereafter see fit to institute against him in said court, we submit that Equity Rule 30 has no application to the cases at bar. For in any other event the sole purpose of invoking the said Rule would be to defeat the express provisions of Section 51 of the Judicial Code and the rights asserted thereunder by the non-resident Respondents. And as was said by Mr. Justice Butler in *General Electric Co. v. Marvel Rare Metals Co.*, 287 U. S. 430, 434, 77 L. Ed. 408, 412, "Rule

30 is without force as against conflicting statutory provisions."

In *Washington Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U. S. 629, 635; 68 L. Ed. 480, 483, Mr. Justice Brandeis says:—

> "But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true, whether the court to which the rules apply be one of law, of equity, or of admiralty. It is true of rules of practice prescribed by this court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred."

A complete answer to Petitioners' contention that the proofs of claim filed in the ancillary cause before the Special Master is in essence a bill in equity filed in an original cause is contained in the excerpt from Judge Northcott's Opinion quoted above (pp. 41-43).

The same argument that denies the contention that parties filing their proofs of claim with a receiver or before a master or upon a reference make themselves parties to the original cause also refutes the contention that the claims are in essence bills in equity.

A reference to a master for the purpose of determining the application of the proceeds realized upon the winding up of a corporation is merely a part and only a part of the process of execution of the final decree in the original suit, and the filing of claims which must be filed to preserve the claimant's rights, whether his claims are legal or equitable, presents no analogy to the bringing of a suit in equity by the suitor in the forum of his choice. The claimants are brought into the pro-

ceeding in a forum, not of their selection, for a special and limited purpose, upon penalty of forfeiting their claims for non-appearance. They are compelled to prosecute such claims in a court of equity without regard to whether their claims be legal or equitable in their nature. They have no choice either in respect of forum or procedure. To sustain Petitioners' contention, would be to make the rule an instrument for perpetrating an injustice, whereas it is clear that the said rule, as well as all other Equity Rules, was merely intended to simplify and make uniform Equity Pleading and Practice.

Petitioners contend; and it apparently also ran in the mind of Judge Soper in his dissenting opinion, that to treat the proofs of claim as bills in equity and the ancillary bill of complaint as an answer and counter-claim thereto would be to further the ends of simplification and promote the orderly administration of the estate in receivership. That such is far from the case a moment's reflection and consideration of the Rule itself will show.

Rule 30 must be read in connection with Rule 25 and succeeding rules. Rule 30 confines itself to prescribing the nature of the answer to the bill in equity, the form of which is prescribed in Rule 25. The second paragraph of Rule 30 requires the defendant to state in short and simple form any counter-claim arising out of the transaction which is the subject-matter of the suit. It further permits the defendant, without cross-bill, to set up any counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and provides that such set-off or counter-claim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final decree in the same suit on both the original and the cross-claims.

It is obvious that the Rule is confined to prescribing the form and contents of an answer and counter-claim filed to an original bill in equity where the bill and answer form part of one and the same suit. It does not go to the length of prescribing, either in express terms or by implication, that where there is an original cause, wherein receivers have been appointed and growing out of which, there is an ancillary proceeding wherein proofs of claim have been presented to a special master, a bill of complaint filed as ancillary to the original cause which sets up new and original causes of action, shall be treated as an answer and counter-claim to the proofs of claim filed in said other ancillary proceeding. Had it been intended that claims filed could be treated as original bills and that a new and original bill could be treated as an answer and counter-claim, surely such practice would have been definitely so provided. Of course we believe that it would not be reasonable to assume that such would have been the intention of the Court, for the result of such practice would be to throw all proceedings of this nature into hotchpot and thereby sanction the practice which was criticised by former Chief Justice Taft in his opinion in the case of *Continental Trust Co. v. Toledo, St. L. and K. C. R. Co.*, 82 Fed. 642. (This Brief pp. 30-32).

We further submit that the application of Rule 30 contended for by Petitioners, rather than tending to simplification would result in confusion. In the cases at bar, five separate and independent claims have been presented by Respondents. The bill of complaint which Petitioners would treat as an answer and counter-claim joins all the Respondents as defendants. It presents four separate causes of action, none of which are common to all of the defendants named. Watson, Hillman and Sheets are alleged to be involved in all and each

Respondent corporation in one only. Nowhere does the bill aver sufficient grounds for uniting all of these causes of actions in one bill.

To hold that said proofs of claim are bills in equity and to permit the bill of complaint to be treated as an answer and counter-claim thereto would seem to be in direct violation of Equity Rule 26 which *inter alia* provides:

> "When there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice."

The authorities which Petitioners cite in support of the statement (Petitioners' Brief 33) "that the counter-claims against Respondents were asserted by Receivers in the form of an Ancillary Bill instead of by Answers to Respondents' claims is not a sufficient reason for refusal to apply the provisions of Equity Rule 30" are, we submit, inapplicable to the proceedings before this Court.

In *Young Co. v. McNeal-Edwards Co.*, 283 U. S. 398, 75 L. Ed. 1140, both the plaintiff and defendant, under the Massachusetts law, had voluntarily invoked the jurisdiction of the same court to adjudicate their particular claims one against the other. The respective controversies arose out of the same transaction between the parties each of whom was in a court of its own choosing.

Chicago & N. W. R. Co. v. Lindell, 281 U. S. 14, 74 L. Ed. 670 and *Partridge v. Phoenix Mut. L. Ins. Co.*,

15 Wall, 573, 21 L. Ed. 229, both sustain the right of a defendant in a suit to plead therein a set-off or counter-claim to avoid circuity of action.

Soper, J., in his dissenting opinion, appears to have been influenced by the fact that he conceived that the application of Equity Rule 30 would promote a speedy liquidation of the estate. He said (R. 76):

> "Indeed, in cases of receivership, there is an added reason to that which led the Supreme Court to promulgate Equity Rule No. 30. When an estate is being wound up by a receiver under the supervision of a court of equity, there is more involved than the right of any claimant; and controversies between the receiver and the claimants should be adjudicated expeditiously, so that the estate may be speedily liquidated and all the creditors may receive their proportionate shares."

In answer thereto, we submit that no court in its desire to have a receivership estate speedily liquidated can equitably or legally sacrifice the rights of an individual claimant under an Act of Congress (Sec. 51 of the Judicial Code). Furthermore we would point out—

(1) That the prompt and orderly administration of an equity receivership is not impeded by the necessity of resorting to a court of competent jurisdiction for prosecuting claims of the receivers against others. In any case the defendant is entitled to his day in court and the case takes its course without regard to the administration of the receivership. Particularly is this true if the defendant has the right to a trial by jury.

(2) In the cases at bar the Circuit Court of Appeals has made adequate provision that the orderly administration of the receivership may be effected and

that the rights of all the parties interested therein be preserved by modifying the decrees of the District Court and decreeing that the Ancillary Bill be treated as a petition to stay action on the claims of the Respondents pending the adjudication of the counter-claims of the Petitioners in a court of competent jurisdiction.

(3) The record shows that on March 30, 1930, more than five years ago, proceedings ancillary to the original cause were commenced in the United States District Court for the Western District of Pennsylvania, of which District all of the Respondents are residents and inhabitants. If Petitioners had conceived that there was any pressing necessity for expediting the causes of action alleged against the Respondents in their bill of complaint, it would seem reasonable to suppose that they would forthwith upon their appointment as ancillary receivers have brought suits thereon in Pennsylvania. Or the prosecution of the claims might have been expedited if, when Respondents' motions in these causes were sustained by the District Court, Petitioners had immediately instituted suit in Pennsylvania instead of appealing from the decrees of said Court to the Circuit Court of Appeals and from thence to this Court.

(6) Comments on Petitioners' Contention That All Claims Asserted in the So-called Ancillary Bill Are Cognizable in Equity.

A decision of the question whether the alleged causes of action contained in the Bill, or any of them, constitute grounds of actions at law or are cognizable in equity, is not necessary to the decision of the fundamental question involved which, as we have heretofore pointed out, is one of venue. After the Circuit Court of Appeals had held that Respondents had not become

parties to the original cause by presenting proofs of claim to the special master, that the so-called ancillary bill was an original bill requiring service of process and that one filing a claim with a receiver does not thereby consent that the court adjudicate any claim which the Receiver may have against him, the opinion (R. 72) contains the following:

> "In so far as the matters set up in the ancillary bill constitute causes of action at law, there is an additional reason why they may not be asserted in the receivership suit. That suit is a proceeding in equity; and the claims filed by claimant and any counterclaims thereto would neccessarily be heard in equity. The claimants, by filing their claims in a court of equity, waive their right of jury trial with respect to the claims filed, but they do not waive such right with (fol. 83) respect to independent claims against them which the receivers may seek to assert by way of counterclaim. It is well settled that a counterclaim involving a cause of action at law cannot be asserted in a suit in equity, because of the right of the party against whom it is asserted to a jury trial under the Seventh Amendment to the Constitution. *American Mills Co. v. American Surety Co.*, 260 U. S. 360; *Sinclair Refining Co. v. Midland Oil Co.* (C. C. A., 4th), 55 Fed. (2d) 42, 47."

Petitioners thereupon in their petitions to this Court for Writs of Certiorari challenged said statement with the assertion that every counterclaim set up in the Bill of Complaint against the Respondents is clearly cognizable in equity. Respondents submit that the Circuit Court of Appeals committed no error in the statement above quoted and, in support thereof, submit the following:

(a) *Discussion of facts alleged in the so-called Ancillary Bill and Relief Prayed for.*

As appears from the Bill, while each of the Proofs of Claim of the Respondents (an analysis of which appears in the Counter-Statement of Facts) is a claim *ex contractu*, each of the alleged causes of action against the Respondents is an action *ex dilecto* and each prayer in connection therewith is for the payment of moneys either had or received, or for damages occasioned by the alleged wrongful acts of the several Respondents. While accountings are asked for on each cause of action, no prayers for discovery are sought in aid of such accountings nor is discovery averred to be essential and in none of the causes of action do the transactions complained of involve mutual accounts between the parties. No specific property is sought to be recovered. The Bill contains no injunction prayers, no allegation that the Bill is brought to avoid a multiplicity of suits nor does it show any other facts which, with the possible exception of those hereinafter mentioned, warrant equitable relief. The several causes of action are not common to all of the Respondents. While the individual Respondents are alleged to be answerable on all of the said causes of action, each of the corporate Respondents is involved only in one particular cause of action alleged against it. While it appears that the individual Respondents, as officers and minority directors of Tower Hill and its former subsidiaries, occupied a *quasi* fiduciary relation thereto, there are no allegations in the Bill upon which to base such a fiduciary or *quasi* fiduciary connection of either corporate Respondent with Tower Hill or its said subsidiaries. The Bill alleges that "the majority of the directors of Hecla and Tower Hill of Pennsylvania were the same persons and Hecla, through its control of Fayette Investment Company, and thereby of Thompson-

Connellsville Coke Company, was the owner of the majority of the capital stock of Tower Hill, which in turn owned all of the capital stock of Tower Hill of Pennsylvania" (R. 52). An averment that A through its control of B, through B's control of C, through C's control of D is the owner of the majority stock of D is, we submit, a mere conclusion of law in the absence of showing the amount of the capital stock outstanding in B, C and D, respectively, and the extent of the stock owned by A in B, by B in C and by C in D, and is not sufficient to charge A with being the majority owner of the stock of D. That the majority of the directors in each of the said Companies was the same does not of itself make Hecla a majority stockholder in either Tower Hill or Tower Hill of Pennsylvania.

(b) *Discussion of Law.*

Petitioners' contention that all of the causes of action alleged in the Bill of Complaint are cognizable in equity is based on the sole premise that each and every Respondent is a fiduciary or *quasi* fiduciary. No distinction is made between the individual and the corporate Respondents.

In the case of each of the corporate Respondents, the cause of action, if an equitable one, must be sustained on other grounds than that of a breach of trust by a fiduciary.

The claim against Hecla reduces itself to one for money damages in a liquidated sum arising out of an alleged tort committed by Hecla, in being able through the medium of Hillman to cause Tower Hill to convey certain coal lands in exchange for an alleged coal plant which Tower Hill was compelled to operate at a loss. It would seem clear that Judge Northcott's

remarks are pertinent to the claim against Hecla and that the action there is exclusively one at law to recover money damages.

The claim against Hillman Company stripped of the verbiage which surrounds it amounts to nothing more than a claim that the Hillman Company charged Tower Hill with unreasonable sums of money for certain expense incurred by Hillman Company in the management and supervision of Tower Hill, keeping its books and selling its output. There is no allegation in the Bill that the Petitioners, to whom the books of Tower Hill were turned over, do not know the exact sums charged to Tower Hill and the exact amounts received by Tower Hill for the sale of its products. If the Petitioners believe these amounts to be excessive, no accounting is required involving any of the other corporations referred to in the Bill, and it seems clear that the action is nothing more than an action at law to recover the difference between the amounts charged and a reasonable sum.

In the claims against the individual Respondents, the Petitioners have invoked the jurisdiction of equity, on the ground that the Respondents as fiduciaries have been guilty of breaches of trust in the management of Tower Hill and its said subsidiaries.

Petitioners cite authorities on the general proposition that whenever there has been a breach of trust committed by a fiduciary, equity jurisdiction attaches, and it may be true that a number of cases from the various State Courts are to the effect that directors or other officers may be sued in equity, as well as at law, for a wilful breach of trust or for actionable negligence, irrespective of whether there is an adequate remedy at law.

Counsel for Respondents, however, have been unable to find a case decided by this Court and Counsel for Petitioners do not cite one which specifically holds that equity jurisdiction attaches where the plaintiff has an adequate remedy at law in the form of money damages for alleged wrong committed by a fiduciary and the bill contains no other averments which show necessity for equitable relief.

On the other hand, this Court in a long line of authorities has held that under the Seventh Amendment to the Constitution and Section 267 of the United States Judicial Code (U. S. C. A. Tit. 28, Sec. 384), suits in equity are prohibited in any Court of the United States where a plain, adequate and complete remedy may be had at law. *Buzard v. Houston,* 119 U. S. 347 at 351; *Scott v. Neely,* 140 U. S. 106 at 110, 35 L. Ed. 358; *United States v. Bitter Root Development Co.,* 200 U. S. 451, 472. 50 L. Ed. 550. 560: *Equitable Life Assur. Soc. v. Brown,* 213 U. S. 25, 53 L. Ed. 682; *Curriden v. Middleton,* 232 U. S. 633 at 636, 58 L. Ed. 765, 767; *Schoenthal v. Irving Trust Co.,* 287 U. S. 92 at 94 and 95, 77 L. Ed. 185, at 187 and 188.

In *Schoenthal v. Irving Trust Co.,* 287 U. S. 92, 95 77 L. Ed. 185, 185, Justice Butler says:—

> "The question whether remedy must be by action at law or may be pursued in equity notwithstanding objection by defendant depends upon the facts stated in the bill. And, in absence of a clear showing that a court of law lacks capacity to give the relief which the allegations show plaintiff entitled to have, a suit in equity cannot be maintained. (Citing cases)."

In cases of alleged fraud, as under any other head of chancery jurisdiction, a federal court will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages when a like amount can be recovered at law in an action sounding in tort, or for money had and received. *Buzard v. Houston*, 119 U. S. 352; 31 L. Ed. 451.

See also *Parkersburg v. Brown*, 106 U. S. 487, 500; *Ambler v. Choteau*, 107 U. S. 586, 27 L. Ed. 322; *Carey v. McMillan*, (C. C. A. 8th), 289 Fed. 380.

There is considerable federal authority which holds that in a suit against a trustee, whether he be an express trustee or a *quasi* trustee or fiduciary, as a director or officer of a corporation, or an agent, for alleged acts of fraud or negligence, where the relief sought against the individual is one for the payment of moneys generally, and the bill discloses no facts which require an accounting or any other recognized equitable relief, equity has no jurisdiction.

Equitable jurisdiction has been denied:

In suits brought against directors and officers of corporations:

Godfrey v. McConnell (C. C. D. Mont) 151 783;

Corsicana Nat. Bank v. Johnson (C. C. A. 5th), 218 F. 822, approved by C. C. A. of the Ninth Circuit in *Adams et al. v. Clark*, 22 Fed. (2d) 956, but distinguished on other grounds;

Cockrill v. Cooper et al., 86 Fed. 7 (C. C. A. 8th);

Stephens v. Overstoltz (C. C. Mo.) 43 Fed. 771;

Kelley v. Dolan et al., (C. C. A. 3rd), 233 Fed. 635.

In a suit against an agent handling the investment of trust funds:

Parkerson v. Borst, 251 Fed. 242 (C. C. A. 1st).

In suits in bankruptcy to recover preferences on the theory that the party receiving the same is a constructive trustee, see the following:

Adams v. Jones, 11 Fed. (2nd) 759;
Schoenthal v. Irving Trust Co., 287 U. S. 92, 77 L. Ed. 185.

And it is to be noted that even among the authorities cited by Petitioners, such as *Clews v. Jamieson*, 182 U. S. 461, 45 L. Ed. 1185, Chief Justice Fuller concludes that portion of the opinion quoted by Petitioners in the Appendix to their Brief, by finding that the facts in that case were such as to require equitable relief, saying on page 481:

> "It may be somewhat doubtful whether an action against these defendants could be maintained at law * * *. The maintenance of this suit enables the whole question between all the parties to be determined therein, and prevents the necessity of any action at law or other proceeding in the courts for the purpose of determining the ultimate and final rights of all the parties to this suit. Such relief cannot be obtained in any one action at law.
>
> "Upon all the facts we think that the jurisdiction of the court was plainly established, because under the circumstances the complainants had no adequate and full remedy at law."

As the alleged causes of action in the cases at Bar are not common to all of the Respondents and as there is plain, adequate and complete remedy at law as against

each, it would seem that Judge Northcott's opinion would apply to the individual, as well as to the corporate Respondents and that their right of trial by jury in a Court of law should be preserved.

If this Court should hold that the said causes of action, or any of them, are cognizable at law, it is submitted that the omitted portion of the opinion of Chief Justice Taft in *American Mills Co. v. American Surety Co. of New York*, 260 U. S. 360, 67 L. Ed. 306, from which Petitioners have quoted (Petitioners' Brief p. 30) in their effort to show that Equity Rule 30 should be invoked in this case and which holds that the said Rule was not intended to change in any respect the line of demarcation between law and equity, as drawn between the Federal statutes and decisions, is particularly applicable.

In the following quotation from the opinion of Chief Justice Taft, we give in italics the omitted portion of the paragraph which is indicated by asterisks in petitioners' brief, (364, 309):

> "The new Equity Rules were intended to simplify equity pleading and practice by limiting the pleadings to a statement of ultimate facts without evidence, and by uniting in one action as many issues as could conveniently be disposed of. *But they normally deal with subjects-matter of which, under the dual system of law and equity, courts of equity can properly take cognizance. They certainly were not drawn to change in any respect the line between law and equity as made by the Federal statutes, practice, and decisions when the rules were promulgated. By the construction which petitioner would put upon Rule 30, it is an attempt to compel one who has a cause of action at law to bring it into*

a court of equity and then try it without a jury whenever the defendant in that cause can find some head of equity jurisdiction under which he can apply for equitable relief in respect of the subject-matter. The order of procedure, as between the law and equity sides in such cases, always has been that the equity issue is first disposed of by the chancellor, and then, unless that ends the litigation, the original plaintiff may have his action at law and his trial by jury secured him by the 7th Amendment of the Constitution. Liberty Oil Co. v. Condon Nat. Bank, decided November 26, 1922 (260 U. S. 235, ante, 232, 43 Sup. Ct. Rep. 118). Petitioner's construction of Rule No. 30 would deny the successful defendant in the equity action this right. Petitioner seeks to avoid the dilemma by the suggestion that the rule would be satisfied by merely pleading the action at law without proving it; but this would be futile."

However, as we have heretofore pointed out, the question here at issue is one of venue, a decision of which does not require a determination of the question whether the alleged claims against Respondents are cognizable at law or in equity.

Wherefore Respondents respectfully submit that the Circuit Court of Appeals for the Fourth Circuit has committed no error in its decrees modifying the decrees of the District Court for the Southern District of West Virginia, and that said decrees should be affirmed.

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APPENDIX.

The practice in bringing creditors' bills in equity to enforce judgment and to subject lands of the defendant to the payment of liens thereon, of reference to a Special Commissioner to hear and adjudicate claims against the defendant and of priorities had been in use in Virginia long prior to the separation of Virginia and West Virginia and at the time of the filing of the opinion in *Arnold v. Casner,* 22 W. Va. 444, if not before the filing of the petition on which the decision was rendered, had become the statutory law of the State. *Barnes West Virginia Code Annotated* (1923) c. 139, Sec. 7, citing Acts of 1872, c. 30; 1882 c. 126. But neither in the Statutes nor in the West Virginia Decisions cited by plaintiffs is there anything which purports to extend the powers of the Commissioners in Chancery beyond adjudicating the following matters, viz.:

(a) What property was owned by the debtor;

(b) The amounts of the various creditors' claims against the debtor's property;

(c) Priority of said claims as between themselves.

Within these limitations he would have full and complete jurisdiction. Beyond these limitations, the procedure does not go. The power to obtain affirmative relief in creditors' bills is not specifically conferred and therefore does not exist.

Neither in *Arnold v. Casner, supra,* nor in any other of the West Virginia cases cited was an attempt made to subject a creditor to a suit for the recovery of a money judgment against him involving new issues not litigated in the original creditors' bill or to claim that service of

process on him could be dispensed with because he was already a party to the litigation by virtue of having previously presented a claim before a commissioner appointed to pass on and adjudicate the claims and priorities thereof under a creditors' bill. *Arnold v. Casner* merely involves the right of a purchaser of the lands of a decedent which were subject to the lien of the decedent's debts to be made a party to a proceeding in which the debts had been ascertained and liquidated by a commissioner appointed for that purpose seven years after the petitioner had purchased the property and had himself paid a number of the claims. The petitioner claimed the right to intervene and reopen the case on the ground that the creditors whose claims had been presented to the Commissioner were not parties to the proceeding. Of course, this could not be done and all the Court holds is that the creditors, including the petitioner himself, who had notice of the proceeding and who had proved their claims thereby became bound by the "proceedings in the cause" as fully as the most formal parties.

Bilmyer v. Sherman, 23 W. Va. 656 and *Wyatt v. Smith,* 25 W. Va. 813 are both cases in which the facts are very similar to those in *Arnold v. Casner, supra,* and arose on creditors' bills to subject the real estate of the defendant to the payment of lien debts, and hold that under the West Virginia Equity Practice creditors, although not named as parties to the Bill, who present their claims are as effectually bound by the adjudication of their claims and the decree *in rem* distributing the assets in the hands of the Court as though they were formal parties to the proceedings.

Bent v. Read, 82 W. Va. 680, is also a creditors' suit to subject land to the payment of creditors' liens thereon and in this case the Court not only comments on

Arnold v. Casner, supra, but holds that creditors, whether named in the Bill or not "become parties *only in the general sense that they may come in and prove their claims* and without other pleadings become for all the purposes of the decree parties plaintiff," the Court saying:

> "We do not understand that the general proposition is controverted that under our statute Sec. 7, Chapt. 139, Code, and the decisions of this court, in relation thereto, that from the time of entry of an order of reference in such suit convening the creditors all creditors whether named in the bill or not become parties in the *general sense* that they may come in and prove their claims, and without other pleadings become for all purposes of the decree parties plaintiff, and that they may not after such suit brought begin and prosecute any other suit for the same purpose on penalty of being enjoined therefrom and compelled to come into the original suit and therein assert their rights. This proposition is affirmed in *Arnold v. Casner,* 22 W. Va. 444, and other cases. Such being the law as provided by statute and adjudged in the decisions cited, it follows that as to all judgments claimed by appellants, which were proved by them or their privies,—and decreed as liens they must be regarded for the purposes of this suit as having been parties plaintiff in that suit for they could not have been defendants therein."

It is submitted that the language employed in the foregoing cause goes no further than to enunciate a well settled rule in the administration of the estate of a decedent or of property in the hands of a receiver or assignee, viz., that the presentation of a claim of a creditor gives the creditor the same standing as though he

were a party to the proceeding *only so far as adjudication of his and other claims against the estate are concerned,* and if, on presentation of his claim, it is disallowed, he is fully bound by the decision as though he were a formal party thereto.